Supreme Court, U.S.
FILED

No. 00 918 DEC - 5 2000

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IN THE
SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 2000

Robert W. Mangieri,
Petitioner,

V.

Paul Mangieri,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

It is axiomatic that Federal Courts are courts of limited jurisdiction. If a matter is not set within the jurisdiction of the federal courts by act of Congress, then it is reserved to the state courts. Where the parties are from different states and the amount in controversy is more than $75,000.00, however, diversity of citizenship exist, and the case is theoretically within the federal court's jurisdiction.

Where exactly does the doctrine of federalism draw the line between the jurisdiction of federal courts in equity and state courts in matters of probate? This Court has not addressed this question since its 1946 decision in Markham v. Allen, 326 U.S. 490. It frequently is said that because federal equity jurisdiction is limited to that exercised by the English Court of Chancery in 1789, the federal courts have no jurisdiction in probate matters. Although it is true that a federal court may not directly probate a will or undertake the administration of an estate, the statement that federal courts have no probate jurisdiction is much too broad.

In the case at bar, the Petitioner was not specifically provided for in his father's Will; nor was he specifically disinherited from his father's Will. Petitioner sought to have a federal court, sitting in diversity to apply the Massachusetts "Omitted Child" statute, Mass. Gen. Laws c. 191, s. 20.

In these circumstances, the first question presented is:

1. May a federal court sitting in diversity adjudicate the rights of an individual to share in an estate that has already been distributed by a state court?

If certiorari is granted on the first question presented, the following question should also be reviewed to provide full relief in this case:

2. Once a federal court determines the rights of an individual in an estate, is it permissible for the court to order the executor to distribute the estate accordingly?

PARTIES TO THE PROCEEDINGS

Petitioner Robert W. Mangieri was the Plaintiff-Appellant below. Respondent Paul Mangieri was the Defendant-Appellee below.

PARENT COMPANIES AND AFFILIATES

Petitioner Robert W. Mangieri has no corporate parent, subsidiary, or affiliate.

TABLE OF CONTENTS

QUESTIONS PRESENTED....i

PARTIES TO THE PROCEEDING....ii

PARENT COMPANIES AND AFFILIATES....ii

TABLE OF AUTHORITIES....v

OPINIONS BELOW....1

JURISDICTION....1

STATUTES INVOLVED....1

STATEMENT....2

A. INTRODUCTION....2

B. MASSACHUSETTS PROBATE COURT PROCEEDINGS....3

C. THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT....3

D. THE COURT OF APPEALS' DECISION....4

REASONS FOR GRANTING THE PETITION....5

1. THE FIRST CIRCUIT'S DECISION WAS CONTRARY TO ESTABLISHED CASE LAW FROM SEVERAL OTHER JURISDICTIONS AND CONSTRUES THE PROBATE COURT EXCEPTION TOO BROADLY IN VIOLATION CONGRESS'S GRANT OF AUTHORITY TO THE LOWER FEDERAL COURTS....5

2. THE FIRST CIRCUIT'S DECISION IS CONTRARY TO THE DECISIONS OF THIS COURT.....6

3. THE LOWER COURTS NEED FURTHER GUIDANCE ON THE OUTER BOUNDS OF FEDERAL DIVERSITY JURISDICTION IN PROBATE MATTERS.....8

CONCLUSION.....15

TABLE OF AUTHORITIES

Cases **Page**

Akin v. Louisiana Nat. Bank of Baton Rouge, 322 F.2d 749 (5th Cir. 1963).....12

Ashton v. Josephine Bay Pauland C. Michael Paul Foundation, Inc., 918 F.2d 1065 (2nd Cir. 1990).....8, 9

Bassler v. Arrowood, 500 F.2d 138 (8th Cir. 1974).....13

Beren v. Ropfogel, 24 F.3d 1226, 1228 (10th Cir. 1994).....14

Dragan v. Miller, 679 F.2d 712, 713 (7th Cir. 1982); cert. denied, 459 U.S. 1017.....8, 12, 13

Dulce v. Dulce, 1997 WL 642329.....9, 10

Foster v. Carlin, 200 F.2d 943 (4th Cir. 1952).....11

Giardina v. Fontana, 733 F.2d 1047 (2nd. Cir. 1984).....8, 9

Glickstein v. Sun Bank/Miami, 922 F. 2d 666 (11th Cir. 1991).....15

Hamilton v. Nielsen, 678 F.2d 709 (7th Cir. 1982).....12, 13

Kittredge v. Stevens, 126 F.2d 263, 266 (1st Cir. 1942).....4

Loyd v. Loyd, 731 F.2d 393 (7th Cir. 1984).....12

Mangieri v. Mangieri, 226 F.3d 1 (1st Cir. 2000).....1

Mangieri v. Mangieri, 99-CV-11812-REK (D. Mass. 1999).....1

Markham v. Allen, 326 U.S. 490 (1946).....*passim*

McClellan v. Carland, 217 U.S. 268 (1910).....7

McKibben v. Chubb, 840 F.2d 1525, 1529 (10th Cir. 1988).....14

Meredith v. Winter Haven, 320 U.S. 228.....5

Michigan Tech Fund v. Century National Bank, 680 F.2d 736 (11th Cir. 1982).....15

Rienhardt v. Kelly, 164 F.3d 1296 (10th Cir. 1999).....14

Turja v. Turja, 118 F.3d 1006 (4th Cir. 1997).....10, 11

Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33 (1909).....7

Statutes

28 U.S.C. s. 1254(a).....1

Mass. Gen. Laws c. 191, s. 20 the "Omitted Child" statute.....1,2

Mass. Gen. Laws c. 215, s. 3.....4

28 U.S.C. s. 1332.....1, 5

U.S. Const. art. III, s. 1 and 2.....5

PETITION FOR A WRIT OF CERTIORARI

Robert W. Mangieri petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals affirming the district court (App. 1) is reported at 226 F.3d 1 (1st Cir. 2000). The opinion of the district court granting summary judgment to the Respondent (App. 5) is reported at 99-CV-11812-REK (D. Mass 1999)

JURISDICTION

The judgment of the court of appeals (App. 1) was entered on September 7, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. s. 1254(a).

STATUTES INVOLVED

This case involves section 20 of the Massachusetts General Laws c. 191, s. 20 the "Omitted Child" statute, as well as the federal diversity statute, 28 U.S.C. s. 1332.

STATEMENT

A. Introduction

This is a federal diversity case filed by the Petitioner, Robert W. Mangieri (hereinafter "Petitioner") against the Respondent, Paul Mangieri (hereinafter "Respondent"), on August 31, 1999. The complaint alleged a claim under Mass. Gen. Laws c. 191, s. 20, the "omitted child" statute, as well as alleging a breach of fiduciary duty count based on the Respondent's actions as executor of the estate of Joseph W. Mangieri. Petitioner is the son and only heir of the testator and claims that he was inadvertently left out of the testator's Will.

On or about November 2, 1984, the testator, Joseph F. Mangieri, executed a Will (hereinafter the "1984 Will") in which he divided his estate between his brother, Robert L. Mangieri, his brother Sal Mangieri, Sal's wife Josephine Mangieri, and other beneficiaries. The 1984 Will did not provide for the testator's son, Robert W. Mangieri. The 1984 Will contained a clause indicating that any children not provided for in the Will were *intentionally* omitted and not omitted by accident or mistake.

On or about February 12, 1987, Joseph F. Mangieri executed an instrument as his last Will and Testament (hereinafter the "1987 Will"). This 1987 Will did not make any provision for the testator's son and only child, the Petitioner. In contrast to the 1984 Will, the 1987 Will did not expressly state that this omission was intentional; nor did it expressly state that the omission was not occasioned by accident or mistake. Instead the new 1987 Will left the entire estate to the testator's nephew, Respondent Paul Mangieri. Respondent was also named as the executor of the Will.

On or about May 28, 1997, the testator directed his attorney to draw up a new Will (hereinafter the "1997 Will") which provided substantially all of the testator's estate for his son, the Petitioner, and such a Will was drawn up. The testator did not provide for the Petitioner during his lifetime and on June 10, 1997, the testator died before he could sign the 1997 Will.

B. Massachusetts Probate Court Proceedings

Respondent Paul Mangieri attempted to file a copy of the 1987 Will with the Barnstable County probate court in order to probate the testator's estate. Petitioner then filed for an administration asserting that the original of the 1987 Will had been destroyed and that the decedent died intestate. The probate court (Scandurra, J.) made detailed findings of fact. After a trial addressing *only* the issues of undue influence and revocation, a copy of the 1987 Will was admitted to probate. The Respondent is now in possession and/or control of the assets of the testator's estate.

C. The District Court's Grant of Summary Judgment

In the district court, Petitioner claimed that he is entitled to a share of the testator's estate as if the testator died intestate; as well as alleging a count of breach of fiduciary duty. Petitioner filed a Motion for an Ex Parte Temporary Restraining Order on or about August 31, 1999. The Ex Parte TRO was denied by the district judge after a hearing on September 2, 1999. (App. 7) A hearing on a TRO was held on September 8, 1999 after notice was given to Respondent's attorney. Petitioner then filed a Motion for a Preliminary Injunction on September 13, 1999. On September 15, 1999, Respondent filed a Motion to Dismiss which the trial court chose to construe as a Motion for Summary Judgment.

Petitioner filed an extensive Motion in Opposition to Respondent's Motion to Dismiss. A hearing was not held on either the Motion for a Preliminary Injunction or the Motion to Dismiss. In an MEMORANDUM and ORDER (App. 11) dated November 4, 1999, the district court (Keeton, J.) ordered that Respondent's Motion to Dismiss be allowed, Petitioner's Motion for Preliminary Injunction be denied, and that judgment be granted for the Respondent, Paul Mangieri.

The district court stated in its Memorandum that: (1) the trial court lacked authority to hear and resolve the case at bar because it was within the jurisdiction of the Massachusetts Probate Court; (2) the trial court lacked jurisdiction or, in the exercise of discretion, should

not exercise jurisdiction over this case; (3) Petitioner's "omitted child" claim should have been heard in the Massachusetts Probate Court pursuant to Mass. Gen. Laws c. 215, s. 3 (App. 10); (4) if Petitioner was asking the trial court for review of the Massachusetts Probate Court's decision, that review was properly had before the Massachusetts Appeals Court or the Supreme Judicial Court. Petitioner filed a timely Notice of Appeal with the United States District Court on November 30, 1999.

D. The Court of Appeals' Decision

After a oral arguments on August 4, 2000, the United States Court of Appeals for the First Circuit affirmed the decision of the district court in almost every particular.

Although it cited this Court's decision in Markham v. Allen and some case law from the Second Circuit, the First Circuit offered scant analysis when it stated the general rule that "Under the probate exception to diversity jurisdiction, 'a federal court may not probate a will, administer an estate, or entertain an action that would interfere with pending probate proceedings in a state court or with a state court's control of property in its custody." (App. 3).

However, the court subsequently acknowledged that "[t]he precise scope of the probate exception has not been clearly established," it is clear that "[a]s a general matter, courts tend to view the probate exception as extending to all suits 'ancillary' to the probate of a will." (App. 3). Here the First Circuit's decision contained only scant citation to case law; the only First Circuit case being Kittredge v. Stevens, 126 F.2d 263, 266 (1st Cir. 1942), a factually distinguishable case that is almost fifty years old.

The First Circuit rejected the Petitioner's argument that the case at bar is factually distinguishable from the cases cited in the district court decision. The court of appeals failed to properly examine and analyze the case law of other circuits, and failed to reexamine the older case law that exists in the First Circuit.

REASONS FOR GRANTING THE PETITION

1. THE FIRST CIRCUIT'S DECISION WAS CONTRARY TO ESTABLISHED CASE LAW FROM SEVERAL OTHER JURISDICTIONS AND CONSTRUES THE PROBATE COURT EXCEPTION TOO BROADLY IN VIOLATION CONGRESS' GRANT OF AUTHORITY TO THE LOWER FEDERAL COURTS.

The First Circuit's decision in the case at bar establishes a sweeping new exception to federal diversity jurisdiction. Under 28 U.S.C. s. 1332(a)(1), a federal court, sitting in diversity may interpret state substantive law if (a) the parties are from different states, (b) the amount in controversy is more than $75,000.00. The mere fact that the district court, in the exercise of the jurisdiction which Congress has conferred upon it, is required to interpret state law is not in itself a sufficient reason for withholding relief to petitioner. Meredith v. Winter Haven, 320 U.S. 228. Such are the facts in the case at bar.

Despite all this, the First Circuit, in affirming the district court in this case, ruled that the federal courts "either lack jurisdiction . . . or in the exercise of discretion should not exercise jurisdiction to make any order that would be inconsistent with or otherwise impede completion of proceedings in that court before it has reached a final disposition." (App. 3). Such a ruling amounts, for practical purposes, to a judicially created exception to federal diversity jurisdiction, which, according to Article III of the United States Constitution, is in the exclusive power of Congress to regulate. Not only is the First Circuit's decision an open invitation for confusion and for proper federal litigation to be denied an acceptable forum for their claims, it is in direct contravention of the explicit grant of authority to federal courts in Article III of the Constitution.

2. THE FIRST CIRCUIT'S DECISION IS CONTRARY TO THE DECISIONS OF THIS COURT.

This Court has long recognized the power and limitations of the federal court system. "It is true that a federal court has no jurisdiction to probate a will or administer an estate, the reason being that the equity jurisdiction conferred by the Judiciary Act of 1789, which is that of the English Court of Chancery in 1789, and did not extend to probate matters." (citations omitted) Markham v. Allen, 326 U.S. 490, 494 (1946).

But it has been established by a long series of decisions of this Court that federal courts have jurisdiction in equity to entertain suits "in favor of creditors, legatees and heirs" and other claimants against a decedent's estate "to establish their claims" so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate, or control of the property in the custody of the state court. *Id.*

Similarly while a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court, (citations omitted), it may exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court. *Id.*

This Court went on to say that "[a]lthough in this case petitioner sought a judgment in the district court ordering defendant executor to pay over the entire net estate to the petitioner upon an allowance of the executor's final account, the judgment declared only that petitioner 'is entitled to receive the net estate of the [testator] in distribution, after the payment of expenses of administration, debts, and taxes.' The effect of the judgment was to leave undisturbed the orderly administration of decedent's estate in the state probate court and to decree petitioner's right in the property to be distributed after its administration. This, as our authorities demonstrate, is *not an exercise of probate jurisdiction or an interference with property in the possession or custody of a state court*." (emphasis added) Markham at 495.

Here is where the decision of the court of appeals in this case is in direct controversy to this Court's position. It is tantamount to ignoring Congress' grant of judicial authority to the lower federal courts and ignoring this Court's decisions.

In Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33 (1909), the Supreme Court explained that [a] citizen of another state may establish a debt against the estate [through an action in federal court]. But the debt thus established must take its place and share of the estate as administered by the probate court; and it cannot be enforced by process directly against the property of the decedent. In like manner, a distributee, citizen of another state, may establish his right to a share in the estate, and enforce such adjudication against the administrator personally, or his sureties; or against any other parties subject to liability, or in any other way which does not disturb the possession of the property by the state court. *Id.* at 44 (internal quotations and citations omitted). In the case at bar, the Petitioner's requested relief is well within the powers of the federal courts.

The Petitioner acknowledged that this Court has also set limitations on the types of remedies that are available in the federal forum: " the courts of the United States, while they may exercise the jurisdiction, and may make decrees binding upon the parties, cannot seize and control the property which is in the possession of the state court." *Id.* at 44.

This Court tempered the limitations of federal diversity jurisdiction by stating that "it is to be presumed that the probate court will respect any adjudication which might be made in settling the rights of parties in this suit in the Federal court. It has been frequently held in this court that a judgment of a Federal court awarding property or rights, when set up in a state court, if its effect is denied, presents a claim of Federal right which may be protected in this court." *Id.* at 46. See also McClellan v. Carland, 217 U.S. 268, 281 (1910).

Given the First Circuit's sweeping ruling in this case, being directly in contrast to this Court's decisions and ripe with the possibilities of confusion, this Court should grant the petition.

3. THE LOWER COURTS NEED FURTHER GUIDANCE ON THE OUTER BOUNDS OF FEDERAL DIVERSITY JURISDICTION IN PROBATE MATTERS

The decisions of the courts of appeals present a broad array of decisions that could benefit from a concise ruling from this Court. The Second Circuit, Fifth Circuit, and Eleventh Circuits all construe the probate exception narrowly, allowing the greatest possible extent of federal diversity jurisdiction. The Seventh Circuit seems to be in the middle of the spectrum, construing the probate exception more broadly than some and more limited than others. The Tenth Circuit applies a *de novo* review when the probate court exception is involved and looks primarily to the extent of state court jurisdiction to define their own. Yet the Fourth Circuit and perhaps the Eighth Circuit have held the probate exception limits federal diversity jurisdiction in order to preserve states' rights.

A. The Second Circuit

Recently, the Second Circuit decided the case of Ashton v. Josephine Bay Pauland C. Michael Paul Foundation, Inc., 918 F.2d 1065 (2nd Cir. 1990). The executors of an estate filed an interpleader action in federal court and sought an injunction to halt an accounting action in Florida Probate court. The district court granted the injunction and the Second Circuit affirmed, claiming that the probate exception does not prohibit the adjudication of rights in an estate in a federal court and does not prohibit a state court being bound by that adjudication of rights. *Id.* at 1071. The Second Circuit, however, cautioned that the probate exception is "one of the most mysterious and esoteric branches of the law of federal jurisdiction." Ashton at 1071 quoting Dragan v. Miller, 679 F.2d 712, 713 (7th Cir. 1982); cert. denied, 459 U.S. 1017.

Ashton quoted this Court's decision in Markham heavily when it went on to say: "it is thus well settled that a federal court may not probate a will, administer an estate, or entertain an action that would

interfere with pending probate proceedings in a state court or with a state court's control of property in its custody." Ashton at 1071 quoting Markham at 494. It is equally well settled, however, that the probate exception does not prevent a federal court from adjudicating rights to property in an estate. Where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court. *Id.*

As supporting authority, the Second Circuit has also decided Giardina v. Fontana, 733 F.2d 1047 (2nd. Cir. 1984) where a plaintiff-daughter brought action against her mother alleging that assignment of rights in deceased father's estate was obtained due to fraud and undue influence. Plaintiff requested a declaration that the assignment was null and void, an accounting of the estate, and declaration of a constructive trust in plaintiff's favor in spite of pending state probate proceedings. The district court abstained from jurisdiction.

The judge in the district court, in dismissing the second complaint, held that one branch of the relief sought, the recision of the assignment, was not directly within the probate exception, but that it was "so intertwined without the matters before the Probate Court, that abstention in favor of the State is appropriate..." *Id.* at 1047. The district judge also found that the accounting, and the constructive trust, all fell squarely within the probate exception, so that the district court did not have subject matter jurisdiction over them.

The Second Circuit reversed and remanded, holding that the requested declaration that the assignment was null and void did not fall within the probate exception to diversity jurisdiction, the accounting of property still subject to the probate proceeding was not within the jurisdiction of the court, yet the accounting of property that had already been given to the mother as a legatee was proper; and that the district court erred in declining to exercise its otherwise properly invoked diversity jurisdiction. Giardina at 1047-1048.

In Dulce v. Dulce, 1997 WL 642329, the plaintiff won a judgment against the defendant in federal district court. Before full satisfaction of the judgment could be obtained, the defendant died. The "personal representative" of the defendant's estate refused to probate the will or give the plaintiff any information regarding the estate.

The plaintiff asked the court to issue an order (1) declaring that he is "entitled to receive $67,000 from the [defendant's] estate," and (2) directing the personal representative to (a) produce the will before the court, (b) file the will for probate, and (c) name the person or persons who informed him of the defendant's death and from whom he obtained the will.

The court denied the plaintiff's requests on the ground that such relief was prohibited by the probate exception to federal court jurisdiction. As to the first request, the court held that it could not "declare . . . that plaintiff is 'entitled' to a particular sum," because "[t]he probate court will have to determine the priority of any competing claims." Likewise, ordering that the will be filed for probate "would amount to administration of that estate, a matter clearly beyond the jurisdiction of this court." The court did not specifically mention the plaintiff's other requests seeking discovery. 1997 WL 642329 at 1.

Yet, the court of appeals reversed, stating, "We believe the court was mistaken in its belief that the probate exception to federal court jurisdiction prohibited the grant of the relief plaintiff sought. In our view, the scope of the probate exception is not as broad as the district court believed it to be." *Id.*

Ashton and Dulce are representative of one area of the spectrum of decisions of the courts of appeal and illustrate that the Second Circuit construes the probate exception very narrowly.

B. The Fourth Circuit

In contrast to other circuits, the Fourth Circuit has construed the probate exception very broadly in order to preserve the rights of the states to adjudicate matters of probate. In Turja v. Turja, 118 F.3d 1006 (4th Cir. 1997), two brothers brought an action against a third brother alleging that he exercised undue influence over their mother, which led her to execute a will, at trust agreement, and related documents in his favor. After a bench trial, the district court concluded that the mother lacked the requisite mental capacity and was unduly influenced in executing the trust documents, and so voided them. The district court, however, found that it lacked jurisdiction because of the probate exception, refused to exercise jurisdiction over the will or rule

on the mother's capacity to execute it. The Fourth Circuit affirmed, stating that "this court has recognized the probate exception as a jurisprudentially limit on diversity jurisdiction. *Id.* at 1008 quoting Foster v. Carlin, 200 F.2d 943 (4th Cir. 1952).

The original complaint in Turja alleged six counts: lack of testamentary capacity, undue influence, fraud, action to set aside deed and other transfers, constructive trust, and unjust enrichment. The district court only dismissed counts I and II under the probate court exception. The district court tried all the remaining counts, and found that the testator lacked the requisite mental capacity, that the defendant in that case exercised undue influence, and that a trust and other legal documents should be set aside. *Id.* at 1008. The court did not examine the rest of the counts, finding resolution in the mental capacity and undue influence counts.

The Fourth Circuit cites Markham v. Allen and goes on to say that: The law is well settled that the federal courts have no jurisdiction over matters within the exclusive jurisdiction of state probate courts. However, as to matters which do not involve administration of an estate or the probate of a will, but which may be determined in a separate action *inter partes* in the courts of general jurisdiction of the state, the federal courts do have jurisdiction if the requisite diversity of citizenship exists. Turja at 1009 quoting Foster at 947. The Fourth Circuit in Foster did try to define the outer limits of their interpretation by saying that "the fact that the complainant prays for incidental relief which the federal court is without jurisdiction to grant does not prevent an adjudication by the federal court of the rights of the respective parties in an estate." Foster v. Carlin, 200 F.2d 943, 948 (1952).

The Fourth Circuit has made it their position that any cases that involve the interpretation of a will, the setting aside of a will, or matters that are within the exclusive jurisdiction of the state probate courts are outside the realm of federal diversity jurisdiction and are subject to the probate exception. Hence, the Fourth Circuit interprets the probate exception expansively and is in disagreement with the Second Circuit.

C. The Fifth Circuit

Only one case could be found from the Fifth Circuit court of appeals, Akin v. Louisiana Nat. Bank of Baton Rouge, 322 F.2d 749 (5th Cir. 1963) where plaintiff brought suit for an order that defendants recognize the rights of plaintiff as an adopted child and heir of the decedent, and that as an heir she was entitled to her forced portion of his estate (as provided by Louisiana law). The Fifth Circuit decided that the plaintiff's request was within the federal jurisdiction , since it was not a suit to annul a will, and the recognition of plaintiff's interest would not affect the probate of the will or the administration of the estate. Hence, the Fifth Circuit is in agreement with the Second Circuit since it construes federal diversity jurisdiction more broadly, and would allow the relief requested by the Petitioner.

D. The Seventh Circuit

In Loyd v. Loyd, 731 F.2d 393 (7th Cir. 1984), a widow brought a diversity action against the administrator of her deceased husband's estate, purchasers of real estate, and an attorney alleging fraud in connection with the sale of real estate and the closing of the decedent's estate. The district court granted summary judgment for the administrator and a motion to dismiss for the purchasers and the widow appealed. As an indication of the ethereal nature of the probate exception, the Seventh Circuit stated, "we simply do not think the exception is a hard and fast jurisdictional rule." *Id.* at 397.

In Dragan v. Miller, 679 F.2d 712, 713 (7th Cir. 1982); cert. denied, 459 U.S. 1017, the plaintiffs filed a diversity action in the district court to have defendants declared constructive trustees of estate assets. The district court dismissed the complaint as within the probate exception. Although the Seventh Circuit (Posner, J.) affirmed the dismissal, the court went on a long dissertation as to the merits of the probate exception.

"The federal court in this case is not being asked to probate a will or administer an estate. The testator's will was admitted to probate in an Illinois court; the court directed the distribution of his estate in accordance with the terms of the will; the estate was distributed to the

people who are the defendants in this action; and with that the probate proceedings ended. The plaintiffs do not want to enjoin or reopen that probate proceeding or reach property in the hands of the state court. There is no such property. The defendants have it, and the plaintiffs want to get it out of their hands. So not only does this lawsuit not ask the federal court to probate a will or administer an estate, but it does not seek to "interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court. Dragan at 713.

In Hamilton v. Nielsen, 678 F.2d 709 (7th Cir. 1982), the court of appeals addressed how far a federal court could go in interpreting state law. Factually, the case consisted of a plaintiff who filed an action as beneficiary of a trust in federal court alleging negligence of trustee and breach of fiduciary duty in the handling of trust assets. The Seventh Circuit found federal court jurisdiction to be proper.

The court stated that "This is not to say, of course, that federal courts can now probate wills in Illinois because the state has abolished its specialized probate court. Probate remains a peculiarly local function which federal courts are ill equipped to perform. However, they went on to say that "...so long as the federal court is faithfully applying Illinois law its decision will not have a systematically different effect than if the action had been brought in the corresponding state court of general jurisdiction. Hamilton at 710.

The Seventh Circuit's approach is rather confusing. It acknowledges the ephemeral nature of the probate exception; yet its decisions do not seem to follow either the Second Circuit or the Fourth Circuit and it seems more dependent on state law. This confusion, therefore, could be remedied by a decision from this Court.

E. The Eight Circuit

Although the Eighth Circuit decided the case of Bassler v. Arrowood, 500 F.2d 138 (8th Cir. 1974), the decision of the court of appeals simply quoted Markham v. Allen, yet based its decision primarily on the doctrine of abstention. Hence, it does not give much insight into the desires of that circuit.

F. The Tenth Circuit

The Tenth Circuit quotes heavily from Markham as well and offers an innovating standard of review in cases involving the probate court exception: ***de novo*** review. In Rienhardt v. Kelly, 164 F.3d 1296 (10th Cir. 1999) Plaintiff was the son of the testator and filed suit against his cousins in the district court of New Mexico, alleging tortious interference with inheritance which is a tort under New Mexico common law. Plaintiff prevailed at trial even though several state proceedings were pending. *Id.* at 1298-1299.

"We review a determination that the probate exception is not applicable under the same standard we apply to other reviews of subject matter jurisdiction: **de novo**." (emphasis added) *Id.* at 1299 quoting Beren v. Ropfogel, 24 F.3d 1226, 1228 (10th Cir. 1994). [F]ederal court do have jurisdiction to entertain suits in favor of... heirs and other claimants against a decedent's estate to establish their claims so long as the federal court does not interfere without he probate proceedings or assume general jurisdiction of the probate or control of the property in custody of the state probate court." Rienhardt at 1300 quoting Markham at 494. Because our jurisdiction is thus limited by the scope of the probate proceedings, federal jurisdiction over probate matters depends on state law. Rienhardt at 1300 quoting McKibben v. Chubb, 840 F.2d 1525, 1529 (10th Cir. 1988).

The standard for determining whether federal jurisdiction may be exercised is whether under state law the dispute would be cognizable only by the probate court. If so, the parties will be relegated to that court; but where the suit merely seeks to enforce a claim inter partes, enforceable in a state court of general jurisdiction, federal diversity jurisdiction will be assumed. Reinhardt at 1300 quoting McKibben v. Chubb at 1529.

In McKibben, the Tenth Circuit affirmed the district court's refusal to accept jurisdiction over a claim of undue influence in the execution of a will since it found the claim was "ancillary to a will challenge and belongs in state probate court." McKibben at 1530. In contrast, the Tenth Circuit accepted federal jurisdiction over challenged inter vivos transfers of property since the state court's of general jurisdiction could hear claims to include property in an estate. *Id.*

G. The Eleventh Circuit

The court of appeals for the Eleventh Circuit, in its opinion in Glickstein v. Sun Bank/Miami, 922 F. 2d 666 (11th Cir. 1991) has narrowly construed the probate exception. In Michigan Tech Fund v. Century National Bank, 680 F.2d 736 (11th Cir. 1982), the court permitted the district court to entertain an action against the decedent's estate that sought a declaration that the decedent's will conveyed certain of the decedent's assets to the plaintiffs. The fact that the resolution of the claims against the estate required the federal district court to interpret the will was insufficient to divest the court of diversity jurisdiction over the claim. Michigan at 740. The Eleventh Circuit allowed the defendants to maintain these claims against the estate despite the pending probate proceeding. Michigan at 738.

The decisions of the courts of appeals are plainly indicative of the need for clarification from this Court. With the Second Circuit, Fifth Circuit, and Eleventh Circuits on one side, the Seventh Circuit in the middle of the spectrum, the Tenth Circuit looking primarily to the extent of state court jurisdiction, and the Fourth Circuit restricting federal diversity jurisdiction the most, a resounding, clarifying decision from this Court is badly needed.

CONCLUSION

Petitioner is an individual who only wants his father's real and natural wishes to be carried out. He has suffered extensive hardship from the confusion and uncertainty that has followed this case. The Petitioner is only seeking the formulaic application of a state statute by a federal court properly sitting in diversity.

For the sake of judicial certainty and to bring all of the judicial circuits into the same realm of thinking, and for the reasons set forth in this Petition, including the vast range of federal appeals court decisions, this Court should grant certiorari in this case.

Respectfully Submitted,

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December 7, 2000